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The Masters Civil Liability for the Wrongful Acts of His Servants

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THE MASTERS CIVIL LIABILITY FOR THE WRONGFUL ACTS OF HIS SERVANTS

of

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for

THE DEGREE OF BACHELOR OF LAWS

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CHAPTER I.

Introductory.

As ageneral and elementary principle of law every person is liable civily for his own acts and for them alone. The two main exceptions to this rule are found in the relations of Principal and Agent and of Master and Servant. I shall attempt to treat here only of the civil liability of the master to third persons arising from the wrongful acts of the servant, as expounded by the courts of the state of New York. The law in the other states does not materially differ from that of New York and time will not permit a discussion of their cases.

The general doctrine of the masters liability is that the master is liable to answer in a civil suit for the tortious or wrongful acts of his servant, if those acts are done in the course of his employment in his master's service. (1) There are two maxims which bear

(1) Smith's Master and Servant star page 322.

upon this rule; Respondeat Superior and Qui facit per alium, facit per se. These maxims are almost identical in principle although the first seems to be more often used with reference to actions ex delicto and the latter to actions ex contractu.

Servants are as a rule persons of little or no financial responsibility, and recourse to them for a just recompense for injuries received or losses entailed by their negligence or other wrongful acts is of little practicable benefit, and it is no more than fair and equitable that the person for whom they are acting and who profits by their deeds should be held liable for any damage suffered by others.

In modern times and under the present degree of civilization it is impossible for business enterprises to be carried on entirely by one man and he must employ others to perform the duties incident to the various commercial enterprises. The law recognizes this right to delegate ones duties and it also recognizes the right of the public to be protected from, and adequately compensated for wrongs suffered through the misconduct of th

the person employed and justly places the liability on the one who having had an opportunity of examination as to the habits and character of his servant employs him in his business and for his benefit.

CHAPTER II.

The Relation of Master and Servant Must Exist.

In order to fix the liability of one person for damages resulting from the act of another, not an agent, the relation of master and servant must be shown to exist between the parties. (1) That is that at the time when the wrong was committed the person committing it must have been engaged in doing an act for the person sought to be charged with the liability, and with his assent.

Whether or not the relation exists is a question for the jury to determine from the facts of each individual case. Several tests are given by the courts. Thus in the case of Michael vs Stanton the test is suggested as to who had the power to discharge the servant, that person alone being considered the m master. In that case one H. was drawing stavebolts belonging to the defendant from Jamesville into the

(1) Stevens v Armstrong, 6 N. Y. 435 (1852) Pack v The Mayor, 8 N. Y. 222 (1853) Svenson v Atlantic Mail Co., 57 N. Y. 108 (1874) Mc Cafferty v S. D. & P. M. R. R. Co., 61 N. Y. 178 (1874) Edwards v Jones 67 How Pr. 177 (1884); Kelly v Doody, 116 N. Y. 575 (1889); Kimball v Cushman 103

City of Syracuse. In crossing a bridge his wagon accidently collided with and injured that of the plaintiff who brings this action. It appeared that the defendant Stanton and a neighbor Gilbert occasionally changed work with their teams. Gilbert sent H. to draw the bolts for the defendant and told him where to load. He H. had worked for defendant before in changing work and had been at Gilberts when Stanton was at work there. Mullin P. J. said; To authorize the justice to render a judgment against defendant he must have found that H. was in defendants employ. Such is not the legitimate conclusion from the evidence. It seems to me clear that H. was in Gilberts employ and the latter not Stanton was liable for his negligence. The defendant did not employ H. and had not the power to discharge him. This is the only test to determine which is the master and as such liable to the person injured. (1)

Mass. 194 (1869); Pickens v Diercher, 21 O. St. 212 (1869)

(1) Michael v Stanton, 3Hun. 462 (1875).

This test appears to me to be the true one. It is the person who employs and has the right to discharge the wrong doer who is liable for the wrongs. Such a one has the opportunity to select and choose his agent and may determine the relation at will. He can examine into his habits and character and when he takes him into his employment he assumes as master the responsibility for his acts.

There are various connections which involve the relation of Master and servant and the above test does not apply to all of them. Thus in Callahan v Sharp (1) the negligence of the driver of a hired livery carriage was held to be so imputed to the person riding in the vehicle as to make her guilty of contributory negligence. But in fixing the liability of the master for damages caused by the act of the servant the owner of the carriage is held to be the master of the driver. (2)

(1) Callahan v Sharp, 27 Hun. 85 af'd. 95 N.Y.672
(2) Norris v Kohler, 41 N. Y. 42 (1869).
Kilroy v D.& H. Canal Co. 121 N.Y. 22 (1890).

So where an undertaker who was, superintend a funeral, furnish carriages et cetera, sent a carriage and team of which the driver was the owner, to carry the the the plaintiff to and from the cemetary, it was held that the relation of master and servantdid not exist between the undertaker and the driver and the under taker was not liable for the drivers negligence. (1) Where a party contracts to keep certain horses for the winter and to board a man to take care of them the latter is deemed the servant of the owner of the carriage. (2) So even where a passive assent to the drivers action was given, the passenger was not held liable for the damage resulting but the driver was regarded as the servant of the owner of the conveyance.(3)

(1) Boniface v Relyea, 36 Barb. 457 (1868).
(2) Stone v Western Transportation Co., 38 N. Y. 240 (1868).
(3) Richardson v Van Ness 53 Hun 267 (1889).

The Relation May be Raised by Implication.

The relation of master and servant need not be expressly and knowingly entered into but from the various circumstances of the case the status will be inferred.

Thus the fact that the defendants name was on the beer delivery wagon, the negligence of the driver of which caused the collision, was held prima facie evidence that the defendant owned the wagon and employed the driver when the accident occured. (1)

Where the plaintiffs raspberry patch was destroyed by fire started by a burning brand thrown from defendants engine, the fact that the person who threw the brand was on the engine and apparently engaged at work there with his coat off was held sufficent in the absence of evidence to the contrary to fairly raise a presumption that he was in the employ of the defendant and rightfully engaged at work uponthe engine. Tre judge in his

(1) Seaman v Koeler, 122 N. Y. 646 (1890);
Mc Gowen v Kuntz, 4 Alb. L. J. 92 (1871);
Svenson v Atlantic Mail Co., 57 N/ Y. 108(1874)
Norris v Kohler, 41 N. Y. 42 (1869).

opinion remarks that the plaintiff could only show the appearances: the defendant knows whether the person was in his employ or not and must show the contrary. (1)

In the case of Durst v Burton the defendantsn represented a voluntary association of farmers who owned a cheese factory. This they leased to one C. who contracted to manufacture cheese for them at a specified price per pound, they to furnish the milk and to have the cheese which they sold. Some of the cheese sold was poor in the center and surrounded with good. The court held that as to the public they assumed the character of principals and adopted the responsibility of the manufacture and were liable for the frauds of C. or his subordinates in the manufacture of the cheese.(2)

A person who directs an officer of the law as to the manner of his executing his duty is regarded as the master of the officer and liable for the negligence of

(1) Mc Coun v N.Y.C.&H.R.R.Co., 66 Barb. 338(1873)
(2) Durst v Burton, 47 N/ Y. 167 (1872); Olive v Whitney Marble Co., 103 N. Y. 292 (1886).

the officer in following his instructions. (1) The keeper of a boarding house is liable as master for the negligence of his servants resulting in the theft of the goods of a boarder. (2)

Liability for Acts of Servants Servant.

Where the servant in the course of his masters business employs another to labor for him or to assist him in his work the master is liable for any damage resulting from such persons negligence or other misconduct. (3) A leading case on this point is Althorf v Wolfe (4) where the defendant a resident of New York City on leaving his house in the morning directed his coachman to clear the snow off the roof of the house. The coachman meeting one Cashan a friend of his asked him to help in the work and they went together on to the roof and shoveled the snow off on to the sidewalk. A mass

(1) Jenner v Joliffe 9 John. 381 (1812)
(2) Smith v Read 6 Daly 33 (1875)
(3) Wood on Master and Servant Sec. 308.
(4) Althorf v Wolfe 22 N. Y. 355 (1860).

of the falling snow and ice from the gutters struck the plaintiffs intestate who happened to be passing at the time and caused his death. Cashan testified that he was employed by no one but merely volunteered to help his friend. There was some evidence tending to show that it was he who threw over the ice. Wright J. in his opinion says "I am of the opinion that, under the conceeded facts of the case, it was not error to refuse to charge as requested, and that it was immateriel, as affecting the defendants liability, whether Fagan (the coachman) or Cashan actually threw that parcell of the snow and ice being removed from the roof which occasioned the fatal injury. In either view it was substantially the act of Fagan, who had been charged by the defendant with the duty of cleaning the roof. The defendant had given him general directions to throw the snow from the roof of his house, enjoining no caution and suggesting no mode of doing it to prevent injury; nor plading the servant under any restriction against procuring aid in the work. I see not therefore why he was not entitled to procure aid and invested with the power of exercising

his own judgment as to the mode of doing the work. He selected Cashan to assist him. Provided with the defendants tools they engage together in the work and in ite progress one of them throws the deadly missle. Is this not substantially the act of Fagan? Fagan was present aiding, directing and controlling Cashan, as much as he directed or controlled the shovel in his own hands. Nobody will doubt that if he had thrown it with his own hands, the defendant would have been responsible. It can scarcely be less a negligent act of Fagan that it was thrown by a person whom he had requested to assist him in the employment in which they were mutually engaged and who had been admitted upon the roof of the defendants house without objection.

Where a servant hired by the month to work defendants farm was directed by him to summer fallow a certain field lying adjacent to plaintiff's wood lot and several piles of brush were collected on the field it was held that when during an extremely dry season the servant directed his son to burn the brush and this was done

in such a negligent manner that plaintiff's wood lot was injured , the master was liable for the damage occasionedas the act was considered as the act of the servant. (1)

So a person employed as the driver of a beer delivery wagon to help him unload a truck of empty barrels was held to be the servant of the master who became liable for his negligence. (2)

The Liability of Public Officers.

Public officers as such are not liable for the wrongful acts of those under them. Thus the Supervisors of Albany County were held not liable to a convict for injuries occasioned to him while in their employ in prison through the negligence of employees. (3)

A contractor who employed the convicts in manu-

(1) Simons v Monier, 29 Barb. 419 (1859).
(2) Gleason v Amsdell, 9 Daly 393 (1880).
(3) Alamango v Supervisors, 25 Hun. 551 (1881).

facturing is not liable to third persons for injuries received through the negligence of the convicts? (1)

A special receiver or assignee of the property of a railroad corporation appointed in bankruptcy proceedings, involuntary on its part is not an agent or servant of the corporation and it is not liable for damages occasioned by his negligence. (2)

So also a receiver or assignee of an insolvent corporation is not liable personally for the acts of its servants. (3) He is only liable as receiver and execution must be against funds which he holds as receiver. $4)

The Board of Education of the City of New York and the several boards of ward trustees are official bodies and the members of such are not individually liable for

(1) Cunningham v Bay State's Shoe and Leather Co., 93 N. Y. 481 (1883).
(2) Metz v The R. R. Co., 58 N. Y. 61 (1874).
(3) Cardot v Barnes, 63 N. Y. 281 (1875).
(4) Camp v Barney, 4 Hun. 373 (1875).

the negligence of their employees. (1) Andrews J. says of the several boards; "They were acting as public officers and in respect to the acts of persons necessarily employed by them, the doctrine of Respondeat superior has no application."

Licensed Persons.

Where the State or a community issues licenses to certain people to do certain acts and compels people to employ only such licensed persons, the relation of m master and servant does not arise between the parties and no liability is incurred. (2)

(1) Donavon v Board of Education 85 N.Y. 117 (1881)
Donavon v Mc Alpin 85 N.Y. (1881).
(2) Mc Mullin v Hoyt, 2 Daly 271 (1867).

Contractor and Contractee.

So where one contracts with another to take entire charge of an undertaking and to furnish materiels and workmen, the relation of contractor and contractee is entered into and not that of master and servant. (1) "The rule is that a person who undertakes the erection of a building or other work for his own benefit, is not responsible for injuries to third persons occasioned by the negligence of a person or his servant, who is actually engaged in executing the whole work under an independent employment or a general contract for that purpose.(2 In McCafferty v The S. D.& P. M. R. R. Co. (3) the defendant contracted with one Decker to build its whole road. Decker subcontracted a portion of the work and while the servant of the subcontractor was blasting, a blast

(1) Barrett v Singer Co. 1 Sweeny 545 (1869); Martin v Farnsworth 41 How. Pr. 59 (1870); Butler v Townsend 126 N.Y. 105 (1871); King v N.Y.C.& H.R.Co. 66 N.Y. 181 (1876).
(2) Pack v Mayor 8 N.Y. 222(1853); Hexamer v Webb, 101 N.Y. 337 (1886).
(3) Mc Cafferty v S.D.& P.M.R.R. 61 N.Y. 178 (1874)

went off negligently and injured the plaintiffs grocery store. The court held that the men were emlpoyed by the subcontractor and the defendant had no control over them and neither hired nor paid them nor could direct nor discharge them, and hence the rule respondeat superior applies and the principal for whom the men were working and by whom they were employed, ie the subcontractor and not the defendant was liable for the damage done to the plaintiff. Where several persons had cut and placed logs on the ice to be floated down the stream in the spring and had contracted with a certain firm to float the logs to the booms of their respective owners , when through the negligence of the contractors servants a jam was formed against the plaintiffs bridge and carried it away it was held that the owners were not liable for the destruction of the bridge. (1)

Lessor and Lessee.

The Lessor is not responsible for the acts of his lessee. Where one railroad leases its road to another and withdraws entirely from the operation of the road it

is not liable for the wrongful acts of the employees of the lessee. (1) So in the case of Blackwell v Wiswall (2) the defendant had a license to run a ferry between Troy and West Troy which he leased to another and a boat rowed either by the lessee or his servant was negligently swamped and the plaintiffs intestate was drowned. The court in its opinion said "The only principal upon which one man can be made liable for the wrongful acts of another is that such a relation exists between them that the former whether he be called principal or master is bound to control the conduct of the latter whether he be agent or servant. The maxim of the law is respondeat superior. It is only applicable in cases where the party sought to be charged stands in the relation of superior to the person whose wrongful act is the ground of complaint. In this case the relation does not exist.

(1) Fisher v Elevated R.R. 34 Hun. 453 (1885).
(2) Blackwell v Wiswall 24 Barb. 355 (1855); Norton v Wiswall 26 Barb. 618 (1858).

While a person may be in the genera; employment of one person he may be specially employed to do certain acts by another and the latter not the former is liable for wrongful acts done while so employed. (1)

(1) Wyllie v Palmer 137 N.Y. 248 (1893);
Olive v Whitney Marble Co. 103 N.Y. 292 (1886);
Robbins v Mount 33 How Pr 24 (1867).

CHAPTER III.

For What Acts the Master is Liable.

Having endeavored to discover when the relation of Master and Servant exists we now proceed to ascertain for what acts of his servant the master is held liable by the New York Courts. The act must be one for the commission of which the master would be liable if it was his ownact and the master is liable for no act of his servant for which an action againstthe servant would not lie. The master is liable for all acts done under his express odrers or directions. (1) But his liability does not by any means end here. He is liable as well for acts done under his implied direction; for all acts of the servant done in the execution of his masters business and within the scope of his employment. (2)

(1) Rounds v D.L.& W.R.R. 64 N.Y. 129 (1876); Althorf v Wolfe 22 N.Y. 355; Mali v Lord 39 N.Y. 381 (1868).

(2) Wood on Master and Servant page 525; Rounds v D.L.& W.R.R. supra; Quinn v Power 87 N.Y. 535 (1882). Cosgrove v Ogden 49 N.Y. 255 (1872).

Thus in Higgins v The Watervliet Turnpike Company (1) the rule was declared to be that the master was responsible civiliter for the wrongful act of the servant causing injury to a third person whether the act was one of negligence or of positive misfeasance, provided t the servant was at the time acting for the master and within the scope of the business entrusted to him. And this is true even though the servant departed from the private and express instructions of the master provided he was engaged at the time in doing his masters business and was acting within the general scope of his employment. (2). Thus in the case of Ochsenbein v Shapley the intending purchaser of a boiler requested the boiler manufacturers to test the boiler and expressed a wish that it be tested to one hundred and eighty pounds. The The boiler maker however replied that one hundred and fifty pounds was enough as its ordinary use would not

(1) Higgens v Watervliet Turnpike Co. 46 N.Y. 23 (1871); Gerlach v Edelmeyer 88 N.Y. 645 (1882)
(2) Rounds v D.L.& W. R.R. 64 N.Y. 129 (1876) Peck v N.Y.C.R.R.Co. 70 N.Y. 587 (1877); Shae v 6th Ave R.R.Co. 62 N.Y. 180 (1875); Day v Brooklyn R.R. 76 N.Y. 593.

require over one hundred and twenty-five pounds pressure and directed his master mechanic Carter, who was present, to test it. Carter and the proposed purchaser started for the place where the boiler was, a public street, and on the way the latter again expressed a wish for a test to one hundred and eighty pounds, and Carter answered "I will test it up to two hundred anyhow; I had as lief test it to four hundred; you can't burst it." The fires were lighted and the experiment began with the sefety valve loaded to a pressure of one hundred and ninety-eight pounds. That point was reached and the escaping steam indicated at least that pressure. By this time the customer had gone, but Carter with a reckless confidence in the strength of the boiler sent two men to the shop for additional weights and before their return, took hold of the lever, first with one hand then with both, holding it down. On the instant the boiler exploded and the plaintiff was injured. He brought suit against the boiler makers. The court in an able opinion by Finch J. but with a dissent of three held that although the act of Carter was reckless and foolhardy and although in making the test he went beyond the

expressed wishes of his employers nevertheless as he was acting in their business they were liable for his act.(1)

Wilful Acts of the Servant.

But when the act of the servant is wilful and malicious it is regarded as evidence that the servant was not acting for the master but was acting without the scope of his employment. The personal intent of the servant, forgetting his master's welfare seems to tend to make him his own master. But where thw act is within the general scope of the servants employment while engaged in his masters business and done with a view to the furtherance of that business and the masters interests, the latter is responsible whether the act be done negligently, wantonly or even wilfully. (2)

(1) Ochsenbein v Shapley, 85 N. Y. 214 (1881).
(2) Mott v Consumers Ice Co., 73 N.Y. 543 (1878); Buffalo Co. v Standard Oil Co., 106 N.Y. 659, af'g 42 Hun. 153.

In some of the earlier cases the courts seemed inclined to hold that the fact that the act was the wilful act of the servant relieved the master from all responsibility (1) but the later cases seem only to regard such intent as evidence as to whether the servant was acting for himself or in the business of his master. Thus in an early case it seems that the "Wave"and the "Samson" were rival steamboats employed in the business of carrying passengers from New York to Staten Island. there was much ill-feeling between th e captains of the two boats and as the "Wave" left her pier at New York one day, heavily laden with passengers, the "Samson" soon followed and overtaking the former ran directly into her. Frommthe evidence there was no doubt but

(1) Vanderbilt v Richmond Co., 2 N.Y.479; Fraser v Freeman, 43 N.Y. 566; Isaacs v Third Ave. R. R. Co., 47 N.Y. 122; Hamilton v N. Y. C. R. R. Co., 51 N.Y. 100.

that the act of the "Samson's" captain was wilful and malicious, and the court held that the boat owners were not liable for the damage caused.(1) But recently it has been held that where the driver wilfully ran his wagon into the carriage of the plaintiff, that the master was not relieved from his liability. (2) Whether or not the act of the servant is wilful is a question for the jury and must be submitted to them. (3)

(1) Vanderbilt v Richmond Co., supra.
(2) Mott v Consumers Ice Co., 73 N.Y. 543.
(3) Mott v Consumers Ice Co., supra; Clark v Koehler, v 46 Hun. 556; Hamel v Brooklyn Ferry Co., 125 N.Y. 707.

CHAPTER IV.

Scope of Employment.

The terms "scope of employment" and "Course of Employment" are used interchangably by the courts although there is some difference in their meaning; The former term refers especially to the question whether the act, in its nature, was within the limits marked out by the contract or instructions under which the servant or agent was acting, while "Course of Employment " directs attention, was the servant at the time , even if we leave out of view the particular act in question, engaged in the performance of service on behalf of his principal or employer (1) What acts are and what are not within the scope or course of a servants employment is a question of fact which must be determined from the facts of each case as it arises. Every employment, every line of work differs as to what duties it lays on those fol-

(1) Abbott's New York Digest, 1892 page 260.

lowing it and perhaps the best way to study the subject will be to take a number of leading illustrative cases and see what the courts have held to be within the scope of employment and what without.

In many cases it is clearly evident that the acts are done within the course of the servants employment as where the driver of an ice wagon ran into a private carriage and damaged it, it is plainly seen that the servant was pursuing, when the accident occured, the line of duty for which he washired. But in other case that the acts are within the scope of the servants duty is more difficult to discover. Thus where a boy fourteen years old was walking in the street with a can of water a driver of the defendants horse car called to him to give him a drink. The horses being at a walk the plaintiff stepped on the front platform and gave to the driver the can. He having quenched his thirst therefrom returned it to the plaintiff talling him to hurry off quick. The boy asked the driver to stop the car but he paid no attention to him and as the

plaintiff was stepping off, whipped the horses into a trot: The boy fell and was run over and injured. The court held that it was within the scope of the drivers employment to eat and drink and that the defendant rail road was liable for the injury occasioned. (1)

In cavanagh v Dinsmore (2) the plaintiff's intestate was killed while crossing the street by a team and truck of the defendant, the Adams Express Company, through the negligence of the driver. The driver after delivering goods at the defendants office was directed to go to the stables of the company and put out his team. On the way he met another driver and as a personal favor to him went to a street about a mile distant and got a trunk and valise belonging to the second driver and took them to a boarding house on Fulton Street. On the way the accident happened. As the company knew nothing of the doings of the driver and in no way authorized

(1) Day v Brooklyn R. R., 12 Hun. 455 af'd in 76 N. Y. (1877).
(2) Cavanagh v Dinsmore 12 Hun. 465 (1878).

the use of their horses and truck for the purpose, the act was held not to be within the scope of the driver's employment.

It has been held that the master is liable if the act of the servant was the proximate cause of the injury. Thus where a young boy about fifteen years old caught on the caboose of a moving freight train, a trainman to dislodge him threw a cup of water in his face which caused him to jump or fall off so that he was injured; th the court said that if the effect of the act was under the circumstances to deprive the plaintiff of the opportunity of exercising care in alighting from the car and thus to cause the injury, then his failure to use the requisite care to protect himself against injury could not be deemed contributory negligence as a matter of law and the railroad company was liable for the injury.(1

In another case a boy having jumped on the car to ride the brakeman ordered him off to which the boy replid

(1) Clark v N.Y.& L.E. & W.R.R. 40 Hun. 305 (1886).

" Wait until you get to Weehawken". The brakeman refused and began to throw pieces of coal at him whereupon the bot retreated to the next car , the brakeman pursuing. Just as the boy was getting ready to jump off the brakeman rolled a large lump of coal on top of the car which struck the boy on the head and caused him to fall beneath the wheels so that he lost a foot and part of the leg. The brakeman was held to have been acting within his authority and in the masters business so as to make the latter liable. (1)

It is well established that the employees of a common carrier are acting within their employment in putting off from the cars or boat or other conveyance, disorderly persons and those who refuse to pay their fare Nevertheless the employees must use care in putting off such persons and for any damage done through their negligence or thoughtlessness the master is liable. So

(1) Lang v N.Y.L.E.& W.R.R. 125 N.Y. 356 (1890).

while one boarding a train may be a trespasser and the employees would be justified in using force to prevent his getting on they have no right to forcibly eject him from the train while it is in motion. (1)

A boy who jumped on the platform of a moving train a and while it was going at the rate of ten miles an hour was kicked off by the conductor or brakeman and injured by the fall, was allowed to recover of the company.(2)

In Schultz v the Rail Road Company (3) the plaintiff boarded the rear platform of the defendants car to ride home and claimed that the conductor without asking his fare pushed him off in front of another car by which he was knocked down and run over. The court held that the defendant was responsible for the alleged act of the conductor in pushing or throwing the plaintiff from the car although the act was wilful, reckless and malicious.

(1) Harlinger v N.Y.C.& H.R.R. 15 WK Dig 352 af'd in 92 N.Y. 661 (1882).
(2) Hoffman v N.Y.C.& H.R.R. 87 N.Y. 25 (1881).
(3) Schultz v 3rd Ave R.R.Co. 89 N.Y.242 (1882).

Where the conductor and driver ejected a sober man claiming that he was drunk, they were held to be acting within their employment. (1) In lawfully removing a person from a train the master is liable for any excess of force used beyond what is needful to effect the result.(2)

Where the ticket agent of a rail road company having been warned by the police to look out for counterfeit five dollar bills, sold tickets to two strangers who paid a new $5.00 bill and received their changeand tickets and he then caused their arrest, he was held not to be acting within his employment, in a suit for damages for false imprisonment, the bill having been proven genuine ; because the duty of the agent to the defendant was to have refused to take the bill if he suspected it to be counterfeit and when he accepted it his only purpose could have been to further the efforts

(1) Higgens v Watervliet Co., 46 N.Y. 23 (1871).(2 Peck v N. Y. C. & H. R. R. 70 N. Y. 587 (1877).

of the police and could not be considered as something which his employers or his employment required him to do. (1)

In Chapman v the N. Y. C. R. R. Co. (2) the defendant's servant after working hours went through a gate from the plaintiffs field to the defendants tracks and left the bars open whereby the plaintiff's horses got on the track and were killed. The servant was a day laborer receiving his pay monthly but at a fixed rate per day. On the night when he took the bars down he was on his own business. He testified that after his days work was done it was his duty "if I seen anything amiss after that I had to do it". The defendant was held liable for it was the servants duty to shut the bars if he saw them down no matter who left them open.

(1) Milligen v N.Y.& R.B.R.Co., 129 N.Y. 506 (1892).
(2) Chapman v N.Y.C.R.R.Co., 33 N.Y.369 (1865).

The Greater Liability of Common Carriers.

In regard to common carriers there grows out of the contractual relation between the parties a liability to the passenger for the servants acts greater and more extended than between the ordinary master and the third person. The rule seems to be that a common carrier is bound so far as practicable, to protect his passengers while being conveyed, from violence committed by strangers and co-passengers and he undertakes absolutely to protect them against the misconduct of its servants while engaged in executing the contract. (1)

The courts of several other states (2) had enunciated this doctrine when it was first definitely adopted by the New York Court of Appeals in the case of Stewart v Brooklyn and Crosstown Railroad.(1) In that case a

(1) Stewart v Brooklyn & Crosstown R. R., 90 N.Y. 588 (1882); Dwinelle v N.Y.C.& H.R.Co. 120 N.Y. 121 (1890-; Palmeri v Manhatten Co. 135 N.Y. 261 (1892).

(2) Goddard v Grand Trunk Railway 57 Me. 202 (1869) Day v Owen 5 Mich. 520 (1858); Commonwealth v Power 7 Metc. 596 (1843); Bryant v Bush 106 Mass. (1871); P.F.W.& C.Ry. Co. v Hinds,

passenger in a street car was assaulted and severely beaten by the driver of the car. The trial court dismissed the plaintiffs complaint on the ground that the defendants servant, in assaulting the plaintiff was not acting within the scope of his employment, but attacked the plaintiff to gratify some wicked and malicious purpose of his own. The Court of Appeals overruled this decision and held the defendants liable. Judge Tracy in his opinion said "Had the person assaulted been one to whom the defendant owed no duty, the dismissal of the plaintiffs complaint would probably have been correct; but the rule which applies in such a case has no application as between a common carrier and his passenger. By the defendants contract withnthe plaintiff, it had undertaken to carry him safely and to treat him respectfully; and while a common carrier does not undertake to

53 Penn. St. 512, (1866); Flint v N.7 N.Y. T. Co. 34 Conn. 554 (1867); Croker v C.& N.Y. Ry. Co., 36 Wis. 504 (1874); Chicago & E. R.R.Co. v Flexman, 103 Ill. 546 (1882).

insure against injury from every possible danger, he does undertake to protect the passenger against any injury arising from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger.

In a recent case the plaintiff purchased a ticket of the defendants agent at one of its stations and after some altercation about the change, passed through the gate to take a train. The agent followed her out upon the platform, charged her with having passed upon him a counterfeit twenty-five cent piece and demanded another in its place. She refused insisting that her money was genuine and refused to give back the change received. The agent called her a counterfeiter and other vile names, placed his hands upon her and told her not to stir until he had procured a policeman to arrest and search her. He detained her on the platform for a while but not getting an officer, let her go. The court held that she could recover and that once the relation of carrier and passenger was entered upon, the carrier was

answerable for all consequenceses to the passenger from the wilful misconduct or negligence of the persons employed by it in the execution of the contract which it has undertaken towards the passenger. (1)

A New York Superior Court decision seems to carry this doctrine still farther and to make the railroad liable as to a passenger to one who is lawfully on their stations in the course of his business, for the company was held liable to a person who having applied for a ticket and having been refused was assaulted as he was leaving the station. (2)

(1) Palmeri v Manhattan Ry. Co. supra.
(2) McKernan v Manhattan Ry. Co., 22 J & S 354, (1887).